Steve Zappetini & Son, Inc. *and* International Association of Bridge, Structural, Ornamental Local 790, AFL–CIO. Case 20–CA–114390

April 30, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On May 8, 2014, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Charging Party filed exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Steve Zappetini & Son, Inc., San Rafael, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 790, AFL–CIO (the Union), or any other labor organization.

(b) Discharging or otherwise discriminating against employees because the Union filed an unfair labor practice charge with the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Vernon Kapphan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Vernon Kapphan whole for any loss of earnings and other benefits resulting from his discharge in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Vernon Kapphan for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Vernon Kapphan, including the requirement that he obtain a doctor's release before returning to work, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its San Rafael, California facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent

[1] On April 23, 2015, the Board denied the Respondent's request that the Board accept its untimely filed exceptions and supporting brief.

[2] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(3), (4), and (1) of the Act by discharging employee Vernon Kapphan because of his union activity and in retaliation for an unfair labor practice charge filed by the Charging Party. The exceptions only concern the Charging Party's request that the Board modify its standard remedies, and we deny that request.

We correct the judge's statement that the Respondent filed for bankruptcy reorganization in November 2011, as the record shows that the Respondent filed for bankruptcy reorganization in November 2012.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violations found and in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the Order as modified.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 26, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 790, AFL–CIO (the Union), or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against you because the Union filed an unfair labor practice charge with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Vernon Kapphan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Vernon Kapphan whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Vernon Kapphan for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Vernon Kapphan, including the requirement that he obtain a doctor's release before returning to work, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

STEVE ZAPPETINI & SON, INC.

The Board's decision can be found at www.nlrb.gov/case/20-CA-114390 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Yasmin Macariola, Esq., for the General Counsel.
Dave Zappetini, pro se, for the Respondent.
David A. Rosenfeld, Esq., for the Charging Party.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. At issue is whether Steve Zappetini & Son, Inc. (Respondent) discharged employee Vernon Kapphan (Kapphan) because Kapphan was affiliated with International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 790, AFL–CIO (the Union), and because the Union filed an unfair labor practice charge.[1] The record reveals that Kapphan was not explicitly discharged. Rather, he was told that he could not return to work without a doctor's release. I find that imposition of a mandatory doctor's release to return to work was, in effect, a discharge. I further find that Kapphan's discharge violated Section 8(a)(3), (4), and (1) of the National Labor Relations Act (the Act).

On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by counsel for the General Counsel, by counsel for the Charging Party, and by the Respondent,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a California corporation located in San Rafael, California, engaged in steel fabrication and installation. Respondent admits that it meets the Board's direct inflow jurisdictional standard.[4] Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.[5] Thus I find that this dispute affects commerce and that the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

II. COLLECTIVE-BARGAINING RELATIONSHIP

Respondent's co-owner and secretary/treasurer is Dave Zappetini. For the past 50 or 60 years, Respondent has had a relationship with the Union through membership in the North Bay Steel Fabricators Association, Inc., consisting of Sun Iron and Respondent. The most recent agreement was effective by its terms from July 1, 2007, through June 30, 2011.

In 2010 or 2011, when Respondent stopped making contributions to the Union trust fund, the employees stopped receiving health insurance coverage. On September 24, the Union filed an unfair labor practice charge, Case 20–CA–114603, regarding failure to make the trust fund payments. In November 2011, Respondent filed for bankruptcy reorganization. The Union trust fund has filed various claims in the pending bankruptcy proceeding.

III. EMPLOYMENT OF VERNON KAPPHAN

Vernon Kapphan (Kapphan) was employed as a machine operator by Respondent for 10 years, starting in the fall of 2003 and ending in the fall of 2013. His supervisor was Brian Zastrow, foreman and estimator. As a machine operator, Kapphan operated a hydraulic punch, hydraulic shears, hydraulic brakes, and a rolling machine. He also performed layout, weld handrail, and installation of steel. During his 10 years with Respondent, he did not receive any written discipline.

Kapphan was a member of the Union during his employment with Respondent and served as the shop steward from January 2012 until his employment ceased. As shop steward for the 8 to 10 unit employees, Kapphan regularly attended Union meetings. In the summer of 2013, Zappetini asked Kapphan to look into rest breaks and make sure employees were clocking in and out so that customers would not be charged for the break. Thereafter, Kapphan complained to the Union that Respondent did not pay for employee breaks. According to Kapphan, Dave Zappetini responded that Kapphan was "chicken shit" and complained that Kapphan told "the Union about every little thing that was happening in the shop." Zappetini testified that there was absolutely no proof that employees were not paid for breaks. Zastrow recalled that Zappetini asked Kapphan whether there was a conflict of interest because Kapphan called the Union regarding payment for breaks. I credit Kapphan's testimony regarding this conversation and note that his testimony was unrebutted and, to a degree, supported by Zastrow. Kapphan and Zappetini attended contract negotiations between the Union and Respondent and another employer, Sun Iron, during the fall of 2013.

Over the course of his tenure with Respondent, Kapphan estimated he was injured on 8 to 10 different occasions. Since beginning his employment with Respondent, Kapphan had been working while using prescription pain medications. He informed Dave Zappetini about his prescription drug use during the first few days of his employment. Zappetini responded that as long as Kapphan could work without any problems, there would be no issue. Kapphan also mentioned his prescription drug usage to coworkers and took medicines openly while at work in front of other employees. For a period of about 3 years (2010–2013), Zappetini asked Kapphan repeatedly to supply a doctor's statement regarding whether it was safe to work while using the pain medications. Kapphan did not supply such a document during this time period.

At some point, either in April or September, Kapphan told Zappetini that the pain medication he was taking was called Norco. Zappetini researched this drug and testified it was a

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[1] All dates are in 2013, unless otherwise referenced. The Union filed the underlying unfair labor practice charge on September 27 and complaint issued on December 20. The hearing was held in San Francisco, California, on March 27, 2014.

[2] Credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[3] General Counsel's motion to strike portions of Respondent's brief which seek to introduce evidence or assertions not presented at the hearing is granted.

[4] *Siemons Mailing Service,* 122 NLRB 81, 85 (1958).

[5] Respondent admitted that the Union was a labor organization within the meaning of Sec. 2(5) of the Act stating, "[Y]es, Until 2010." However, based upon the testimony of Erik Schmidli, business manager of the Union, it appears that the Union continues as an organization in which employees participate existing for the purpose of dealing with employers concerning wages, hours, and terms and conditions of employment. Thus, I find that the Union satisfies the requirements of Sec. 2(5) of the Act at all times material.

derivative of Vicodin. Zappetini also learned that Kapphan was taking six doses per day. After discovering this further information, Zappetini stepped up his requests for a doctor's release but there were never any consequences imposed for Kapphan's failure to produce the release.

Kapphan's most recent injury was in March 2013 when a transmission fell from a fork lift onto Kapphan's chest and arm. Kapphan received medical bills for treatment of this injury and passed them on to the Union. The Union filed a second amended proof of claim on September 4 for Kapphan's medical bills, lost wages, and COBRA insurance payments among other claims.

Kapphan and Zappetini testified that Zappetini asked Kapphan whether this bankruptcy claim created a conflict of interest with Respondent. Zappetini's initial testimony was, "I asked him if this would—yes, if that would put us into a conflict of interest." Zappetini's affidavit to the NLRB confirms his and Kapphan's testimony. However, later Zappetini testified that he actually thought he made this statement earlier with regard to the earlier break pay matter. I find that although Zappetini may have made the statement with regard to Kapphan's reporting his belief that he was not receiving breaktime pay to the Union, as Zastrow recalled, Zappetini's affidavit was given during the investigation of the unfair labor practice charge, at a time when his recollection would have been fresher. Thus, I credit Kapphan's and Zappetini's testimony that Zappetini asked Kapphan in connection with the bankruptcy claim whether Kapphan had a conflict of interest with Respondent.

Around September 24, Zappetini received an unfair labor practice charge filed by the Union regarding alleged failure to make trust fund contributions. On September 26, Kapphan arrived from the galvinzers late. Zappetini confronted him about coming in late. Kapphan and Zappetini testified in accord to the following conversation. Zappetini referenced the unfair labor practice matter asking if Kapphan had determined whether they had a conflict of interest (Zappetini's testimony) or telling Kapphan they had a conflict of interest (Kapphan's testimony). I find the slight discrepancy (asking versus telling) insignificant. Zappetini and Kapphan agree on the following testimony: Zappetini then stated that Kapphan had never given him a doctor's note certifying that Kapphan could continue working while taking prescription pain medicine. Zappetini explained that if Kapphan brought in the note, he could continue working.

According to Kapphan, Zappetini added that Erik Schmidli, Union representative, had lied to him when he said the Union would help him out because the Union never did so. According to Zappetini, he told Kapphan, "You know, I've been after you for I don't know how many months to bring in a doctor's certificate stating, you know, that it's okay for you to work while you're on medication." Zappetini further told Kapphan that he needed the doctor's release because he considered Kapphan's behavior erratic. I credit both Kapphan and Zappetini as to these unrebutted statements.

After this conversation, on the following day Kapphan removed his tools. He received a partial pay period check for September 25 and 26 and another check for accrued vacation pay. On October 2, Kapphan faxed a letterhead document from his doctor stating, "From a medical standpoint, Mr. Kapphan has been working for a number of years on his current medications with no issues." Zappetini received the faxed doctor's note but "didn't think it was a proper document." Zappetini contacted the doctor but did not get a response. Zappetini did not contact Kapphan about the doctor's note. Zappetini testified:

> I—quite frankly, I read that and I didn't think that it was a proper document. . . . It did not state . . . anything about . . . the medication he was taking and that it was okay for him to work there. All it said is he's been taking it or whatever. They—the doctor did not know how many he was taking or how often he was taking them. . . .

IV. ANALYSIS

The General Counsel claims that Respondent discharged Kapphan because of his protected, concerted activity in violation of Section 8(a)(3), (4), and (1) of the Act. Respondent claims, on the other hand, that Kapphan voluntarily quit because he did not provide a doctor's release to work.

Normally, if an employee voluntarily quits, he cannot claim discriminatory discharge. Respondent claims that Kapphan voluntarily quit because he simply gathered his tools, thanked Respondent for 10 years of employment, and never came back. However, at the time he left, Kapphan was told that he could not return to work without a doctor's release. This statement was made to Kapphan in the context of once again being either questioned or told that his Union activity constituted a conflict of interest with Respondent. Kapphan received his regular paycheck which was followed the next day by a partial paycheck and a check for accrued vacation pay. When he did provide a doctor's release, it was found unacceptable. Thus, I find that, at best, Kapphan was suspended pending a doctor's release on September 26 and his suspension was converted to a discharge on October 2 when his doctor's release was not accepted.

Alternatively, it is possible to analyze these facts as a "Hobson's choice" constructive discharge. This analysis similarly yields a finding of discharge. Under some circumstances an employee who has quit may be deemed to have been constructively discharged. In *Intercom I (Zercom),* 333 NLRB 223 (2001), the Board described two theories of constructive discharge. The traditional theory involves deliberately changing an employee's working conditions because of the employee's protected activity in order to force the employee to resign. Id., fn. 3. The other alternative, the Hobson's choice, occurs when an employer conditions continued employment on abandonment of Section 7 rights and the employee quits rather than complying with the condition. Id., fn. 4.

In *Intercom I*, supra, a prounion activist was given 4 days to change her "negative attitude" or she would be discharged. Reversing the judge, the Board held that the employee, who quit before the 4 days had elapsed, was constructively discharged. The Board found that the euphemistic term "negative attitude," meant her prounion attitude. The Board found that the employee reasonably believed that she had a choice between abandoning her Section 7 rights or being fired. The

same may be said here. Kapphan was questioned or told for the third time that his prounion activity might be a conflict of interest with Respondent. At the same time he was told that he could not return to work without a doctor's release. This could reasonably be viewed as a choice between abandoning Union activity or employment. Although I do not believe these facts indicate that Kapphan quit, if it were found that he did quit, then he did so under circumstances in which he could reasonably believe that his choice was either to give up his Union activity or quit.

Having found that adverse action did take place with regard to Kapphan's employment, it is necessary to determine whether the adverse action was discriminatory. The General Counsel claims that Kapphan was discharged for his Union activity and because of Respondent's mistaken belief that he filed an unfair labor practice charge. Respondent urges that any adverse action was taken solely because Kapphan failed to provide a doctor's release. Thus, this is a dual motive case and is decided pursuant to a burden shifting analysis based on *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977). *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In *Naomi Knitting Plant,* 328 NLRB 1279, 1281 (1999), the Board summarized the elements of the General Counsel's initial burden of persuasion as follows:

> (1) That the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

Once the General Counsel satisfies this initial showing, the burden of persuasion shifts to Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

As set forth above, it is clear that Kapphan engaged in protected activity by his membership in the Union, by attending Union meetings in his position as shop steward and sharing the meeting highlights with unit employees, and by complaining to the Union about payment for employee breaks.[6] Further, Respondent was cognizant of Kapphan's activity as shop steward, his attendance at negotiations, and his submission of complaints to the Union regarding employee breaks and failure of Respondent to cover his medical bills for a work-related injury. Although Kapphan's name is not mentioned in the unfair labor practice charge filed on September 24 regarding Respondent's cessation of trust fund payments, Zappetini attributed this charge to Kapphan. The absence of Kapphan's name on the charge, however, does not absolve Respondent. An employer may violate the Act when it takes action based on a mistaken belief that the employee has engaged in concerted activity.[7]

Further, there is substantial evidence that Respondent's action was substantially motivated by Kapphan's Union activity. The conversation leading to Kapphan being told not to return to work until he produced a doctor's slip is cogent proof. In this single conversation, Zappetini's mistaken belief that Kapphan was involved in filing an unfair labor practice charge against him led to discussion of whether Kapphan had a conflict of interest[8] with Respondent and then to telling Kapphan not to return to work until he could produce a doctor's statement. Respondent's timing of the requirement to produce a doctor's statement came on the same day Respondent learned of the NLRB action. This timing alone links the filing of the charge with the imposition of a doctor's slip and proves that Respondent's action was substantially motivated by the filing of the unfair labor practice charge and Respondent's mistaken belief that Kapphan was involved in the filing of the charge.

Moreover, other indicia reinforce this motivational finding. Respondent, through Zappetini, evidenced animus toward Kapphan's Union activity by describing his breaktime payment report to the Union as "chicken shit" and by questioning Kapphan about a conflict of interest because he reported the breaktime and medical expense matters to the Union. Thus, I find that the General Counsel has satisfied the initial burden of persuasion and the burden of persuasion shifts to the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Zappetini testified that the reason Kapphan's employment ceased was because Kapphan could not produce a doctor's release stating that it was safe for Kapphan to work while taking prescription pain medications.[9] Of course, if sufficient evidence supports this nondiscriminatory reason, Respondent would satisfy its burden to show that Kapphan's employment would have ceased even in the absence of Kapphan's Union activity. However, articulation of a nondiscriminatory reason is not, alone, sufficient to satisfy Respondent's burden. To satisfy the burden, Respondent must affirmatively introduce enough evidence to persuade the trier of fact that the same action would have taken place absent the employee's union activity and the

[6] Respondent asserts that Kapphan's complaint to the Union regarding payment for employee breaks was based on Kapphan's erroneous understanding of the contract. It is immaterial whether Kapphan's understanding was correct or not. *Firth Baking Co.,* 232 NLRB 772, 772 (1977).

[7] *Link Belt Co.,* 311 U.S. 584 (1941). See also *World Color (USA) Corp.,* 360 NLRB No. 37, slip op. at 2 fn. 6 (2014), citing *Monarch Water Systems,* 271 NLRB 558 at fn. 3 (1984); *Maple City Stamping Co.,* 200 NLRB 743, 743, and 754 (1972) (discharge based on erroneous belief that employee filed unfair labor practice charge violates Sec. 8(a)(4)).

[8] As the General Counsel points out, the Board has found that telling employees that their union activity creates a conflict of interest supports a finding of union animus. See *Facchina Construction Co.,* 343 NLRB 886, 887 fn. 5 (2004), enfd. 180 Fed.Appx. 178 (D.C. Cir. 2006) (statement that wearing union clothing and insignia creates conflict of interest is evidence of animus).

[9] Zappetini also testified that at the time Kapphan's employment ceases, work was slowing down and Kapphan would have been laid off for lack of work. Zappetini did not tell Kapphan that he was laid off for lack of work. To the extent this might be an issue, it can be fully addressed in the compliance phase of this proceeding.

employer's animus toward that activity.[10]

Zappetini testified that on September 26, he told Kapphan that he needed a doctor's release because he found Kapphan's behavior erratic. However, there is no evidence that "erratic behavior" was discussed with Kapphan at any time until September 26.[11] Zappetini acknowledged that for "the last couple of years" he knew that Kapphan was working while taking prescription drug medications. After Kapphan told him that the medication was Norco, a narcotic pain reliever, Zappetini increased his requests for a doctor's release.[12] However, Zappetini further acknowledged that until September 26 he did not take any adverse action when Kapphan failed to produce a doctor's release.

Issues of safety in the workplace are, of course, extremely important. The record indicates that Respondent had concerns about Kapphan's use of pain medication while working but for a number of years did not insist that a doctor's release be on file. As Zappetini testified, "We kept asking him. And he kept putting it off. And I'd get busy and I'd forget about it." Then, on September 26, in the context of discussing Kapphan's involvement in an unfair labor practice charge and whether that meant Kapphan had a conflict of interest with Respondent, Zappetini told Kapphan he could not return to work without a doctor's release. There is no explanation as to why the release finally became mandatory after years of discussing it.

The explanation, however, is plainly obvious in the conversation. In almost the same breath, the filing of the unfair labor practice charge brings up concerns about a conflict of interest and the doctor's release becomes mandatory. The two are conjoined in a single conversation. Respondent's attempt to defend on the grounds of a legitimate business concern, a release, is without merit given this context.

Accordingly, I find that Respondent has failed to show that it would have taken the same action absent Kapphan's protected activity. Thus, I find that by insisting that Kapphan produce a doctor's release before returning to work, Respondent violated Section 8(a)(3), (4), and (1) of the Act.

CONCLUSION OF LAW

By insisting that Kapphan produce a doctor's release in order to return to work, Respondent discriminated against Kapphan for his union activity and because the Union filed a charge in Case 20–CA–114063 in violation of Section 8(a)(3), (4), and (1) of the Act. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3), (4), and (1) of the Act, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily ordered an employee not to return to work without a doctor's release, it must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Further, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Kapphan for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.,* 359 NLRB No. 44 (2012). Additionally, I will order that the customary notice be posted and published in the usual manner. Consistent with *Durham School Services,* 360 NLRB No. 5, slip op. at 2–3 (2014), the notice will include a hyperlink to a copy of this decision as well as a QR code and alternate information for obtaining the decision by telephone or mail.

The Union requests additional remedies including

- Notice Posting Period: Based on its claim that the 60-day notice posting period is inadequate, the Union requests posting from either the date the unfair labor practice was committed or when complaint issued until the notice is actually posted. Thus, using this case as an example, the Union requests posting either from September 26 (date doctor's release made mandatory) or December 20 (date complaint issued) until the date of actual posting.
- Notice Mailing: The Union further requests, not as an extraordinary remedy as in *Bud Antle,* 359 NLRB No. 140 (2013), but as a standard remedy in all cases, that the notice be mailed to all employees who worked at the facility any time between commission of the unfair labor practice and when the notice is posted.
- Notice Description of Unfair Labor Practices Found: The Union also requests that the notice describe the violations found in detailed language rather than the cursory language typically used in the WE WILL NOT section of the notice.
- Notice Description of Section 7 Rights: The Union requests that in cases which involve only the right to engage in union or concerted activity that the standard notice language, "FEDERAL LAW GIVES YOU THE RIGHT TO . . . Choose not to engage in any of these protected activities" be eliminated as inappropriate.
- Employer Provided Copies of the Decision: The Union requests that the employer should be required to make decisions available to employees either by mailing them to employees or posting them on any existing company intranet.

[10] *Hyatt Regency Memphis,* 296 NLRB 259, 260 (1989), quoting *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1981), enfd. 944 F.2d 904 (6th Cir. 1991); *Hicks Oils & Hicksgas, Inc.*, 293 NLRB 84, 84–85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

[11] Respondent's offer of proof regarding an incident that Zappetini believed showed Kapphan's "mental lapse" on a project was rejected.

[12] Zappetini testified, "I questioned the fact that he was taking medication. I was unaware of which medications that he was taking. After I found out which medication he was taking, then I started questioning him more often about the—the doctor's report."

The Board possesses broad remedial authority and may consider the Union's requests for reconsideration of its standard notice language and its posting procedures. See, e.g., *Durham School Services,* 360 NLRB No. 85, slip op. at 2–3 (2014) (hyperlink and QR code added to notice); *J. Picini Flooring,* 356 NLRB No. 9 (2010) (notices to be placed on intranet); *Ishikawa Gasket America, Inc.,* 337 NLRB 175, 176–177 (2001) (notices to use plain, clear language rather than legalese). However, in the absence of Board authority implementing the changes the Union requests, precedent requires my adherence to the standard notice language and I decline the Union's invitation to grant these requests.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Steve Zappetini & Son, Inc., San Rafael, California, its officers, agents, successors, and assigns, shall cease and desist from discriminatorily requiring Vernon Kapphan to produce a doctor's release in order to return to work because he engaged in union or other protected concerted activity and because International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 790, AFL–CIO filed an unfair labor practice charge in Case 20–CA–114063 or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Further, the Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

1. Within 14 days from the date of the Board's Order, offer Vernon Kapphan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

2. Make Vernon Kapphan whole for any loss of earning and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

3. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful requirement that Vernon Kapphan obtain a doctor's release before returning to work, and within 3 days thereafter notify Kapphan in writing that this has been done and that the unlawful requirement that he obtain a doctor's release before returning to work will not be used against him in any way.

4. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5. Within 14 days after service by the Region, post at its facility in San Rafael, California copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 26, 2013.

6. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 8, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post, mail, and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 790, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you because the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, as provided in Sec. 102.48 of the Rules, shall be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

790, AFL–CIO, or any other union files an unfair labor practice charge with the NLRB.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Vernon Kapphan full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Vernon Kapphan whole for any loss of earnings and other benefits resulting from his discharge plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful requirement that Vernon Kapphan obtain a doctor's release before returning to work, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that this unlawful requirement will not be used against him in any way.

STEVE ZAPPETINI & SON, INC.

This decision can be found at www.nlrb.gov/case/20-CA-114390 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570 or by calling (202) 273-1940.